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Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 311.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Corporation, Petitioner,

v.

SOPHIA C. BACHMANN, Respondent.

REPLY BRIEF FOR PETITIONER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

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INDEX TO REPLY BRIEF.

	PAGE
Introductory Statement	1
Argument	3
I. Petitioner's specification of defense under the Prohibited Articles Warranty was in proper form to raise the important question now under discussion—that is, whether or not petitioner was required to prove that the keeping of a prohibited article on the premises was "within the control or knowledge" of the respondent; and it was so regarded by both the District Court and the Circuit Court of Appeals	3
II. The respondent's own interpretation of the modification made in the Prohibited Articles Warranty by the "rider" condemns the District Court's charge as erroneous	15
III. The case of Whitlatch v. Mutual Fire Insurance Company	20

Table of Cases and Authorities Cited.

49 Corpus Juris, 787	8
Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113	8
Lohr v. Wolfe, 71 W. Va. 627	6
Long v. Pocahontas Collieries Co., 83 W. Va. 380	6
21 Ruling Case Law, pages 452, 453	8
Wilson v. Phoenix Powder Co., 40 W. Va. 413	6
Vrendenburgh v. Bachmann, 11 Fed. (2nd) 473	7

Table of Statutes Cited.

West Virginia Code of 1923, Ch. 125, Sec. 64	3
West Virginia Code of 1923, Ch. 125, Sec. 66	4

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Introductory Statement.

In submitting this reply brief, it is not our intention to burden the court with a repetition of the argument and the citations of authorities contained in petitioner's original brief; nor shall we attempt to point out, by a critical analysis of respondent's brief, various assertions of fact and statements of law therein contained with which we can not agree. After all, this case presents just one simple question, namely, the proper interpretation of the Prohibited Articles Warranty in respondent's policy, after the addition of the so-called "rider" or "permit". It seems to us that there is a consistent effort throughout respondent's brief to dodge this simple issue, and to attempt to distract the attention of the court from it by continually referring to and discussing matters which are entirely beside the

point. However, we have complete confidence in the ability of this court to separate the wheat from the chaff, and to avoid being led off on a false scent by the argument of counsel.

The primary purpose of this brief is to reply to that portion of the respondent's brief which attempts to defend the District Court's charge (the jury having been instructed that it was incumbent upon petitioner to prove that the respondent had "control or knowledge" of the gasoline found in the Bachmann Building), on the theory that petitioner's defense under the Prohibited Articles Warranty had been narrowed or restricted by reason of certain averments contained in its specification of defense, although neither the District Court nor the Circuit Court of Appeals took this view of the case.

Argument.

I.

PETITIONER'S SPECIFICATION OF DEFENSE UNDER THE PROHIBITED ARTICLES WARRANTY WAS IN PROPER FORM TO RAISE THE IMPORTANT QUESTION NOW UNDER DISCUSSION — THAT IS, WHETHER OR NOT PETITIONER WAS REQUIRED TO PROVE THAT THE KEEPING OF A PROHIBITED ARTICLE ON THE PREMISES WAS "WITHIN THE CONTROL OR KNOWLEDGE" OF THE RESPONDENT; AND IT WAS SO REGARDED BY BOTH THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS.

About one-third of respondent's brief (see pages 9 to 28 of brief) is wholly devoted to the argument that it was proper for the District Court to charge the jury that "control or knowledge" of the gasoline by the respondent must be proven by the petitioner, because of an averment in petitioner's specification of defense under the Prohibited Articles Warranty that the keeping of prohibited articles on the premises was "well known" to the respondent. We submit that this argument will not stand analysis for various reasons.

(1) *The averment in petitioner's specification of defense that respondent had knowledge of the prohibited articles did not require proof thereof, if in fact "control or knowledge" on the part of the insured was not an essential element of the defense under the Prohibited Articles Warranty.*

Chapter 125, Section 64, of the West Virginia Code of 1923, relating to pleadings to be filed in insurance cases, provides as follows:

> "If in any action on a policy of insurance, the defense be that the action cannot be maintained because of the failure to perform or comply with,

or violation of any clause, condition or warranty in, upon or annexed to the policy, or contained in or upon any paper which is made by reference a part of the policy, the defendant *must file a statement in writing specifying by reference thereto, or otherwise the particular clause, condition or warranty in respect to which such failure or violation is claimed to have occurred.*" (Italics ours.)

Chapter 125, Section 66, of the West Virginia Code of 1923, provides:

"But no statement which, in the particulars required by or under the said sections to be stated or referred to therein, is *sufficient to notify the adverse party in effect of the nature of the claim or defense intended to be set up against him, shall be adjudged insufficient.*" (Italics ours.)

Pursuant to these statutes, petitioner filed in the District Court, as one of its specifications of defense, the following:

"The following condition and warranty is also found in said policy:

'Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fire works, greek fire, phosphorous, explosives, benzine, *gasoline,* naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding 25 pounds, or kerosene oil exceeding five barrels.'

> The defendant says that at the time of the fire complained of, and prior thereto, *large quantities of gasoline,* explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises, all of which was well known to the plaintiff and her agent or agents, and *was in violation of the foregoing condition and warranty."* (R. 13-14.) (Italics ours.)

Thus the petitioner, after quoting the Prohibited Articles Warranty, alleged that two of the prohibited articles, namely, *gasoline* and *explosives,* were being kept in the Bachmann Building "in violation of the foregoing condition and warranty".

The respondent filed a reply to this specification of defense, alleging that the "rider" or "permit" attached to the policy eliminated the prohibition against the keeping of gasoline (R. 16-17).

Throughout her brief, respondent argues that because petitioner's specification of defense quoted above included a recital to the effect that the keeping of gasoline in the Bachmann Building was "well known" to the respondent or her agents, petitioner can not now establish a breach of the Prohibited Articles Warranty without proving that such breach was "well known" to the respondent, *notwithstanding the well-established rule, universally recognized by the authorities as shown in our original brief, that under the standard Prohibited Articles Warranty knowledge or control of a prohibited article on the part of the insured is not required to be proven.*

The contention which respondent thus advances is so obviously unfounded that a reply seems hardly necessary. However, since the proposition is so con-

stantly referred to throughout respondent's brief, a discussion of it would seem to be justified.

The question raised may be briefly summarized as follows: A defendant pleads certain facts which constitute a defense to the plaintiff's claim. The plea also alleges that the plaintiff *had knowledge of such facts.* As a matter of law, however, proof of plaintiff's knowledge is not essential to the defense pleaded; in other words, the plea is sufficient without it. In such a case, *must the defendant prove the fact of knowledge, which is alleged, but is not an essential element of the defense?*

The query presents no real difficulty. It is uniformly held in West Virginia and elsewhere that *any unnecessary averment of a pleading will be treated as mere surplusage.*

In *Wilson v. Phoenix Powder Company,* 40 W. Va. 413, syllabus No. 2 is as follows:

> "Allegations of fact not necessary to maintain an action or defense are immaterial and surplusage, and need not be proven."

In *Lohr v. Wolfe,* 71 W. Va. 627, point 2 of the syllabus reads as follows:

> "If other facts not necessary to maintain the action or defense be alleged, such facts may be treated as surplusage and need not be proven."

In *Long v. Pocahontas Collieries Company,* 83 W. Va. 380, point 2 of the syllabus is as follows:

> "Where the declaration or other pleading states a good cause of action, but broader than the contract or other liability proven, objection to the evidence or motion to exclude based on variance, not specifically stated to be on that ground, should

after verdict be treated as waived and be disregarded."

The decision of the Circuit Court of Appeals for the Fifth Circuit in *Vrendenburgh v. Bachmann,* 11 Fed. (2nd) 473, is squarely in point. There, the plaintiffs had sued in a District Court in Texas to recover damages because of alleged fraudulent representations made by the defendants in connection with a certain real estate deal. The plaintiffs' complaint alleged that the defendants *knew the representations were false* at the time they were made. A Texas statute provided that in real estate transactions, a party making false representations should be liable for damages, *irrespective of his knowledge of the falsity of his statements.* The District Court charged the jury, as appears at page 473 of the opinion, as follows:

> "The plaintiffs were not entitled to recover unless the representations alleged and deposed to were known to be false at the time they were made, and were made with the intent and purpose of deceiving the parties to whom they were made."

The Circuit Court of Appeals for the Fifth Circuit reversed the judgment for the defendants rendered below. We quote from page 474 of the opinion:

> "The above mentioned instructions are not sustainable because the petition contained allegations to the effect that defendants knew that the stated representations were not true. *Those allegations were not of a fact which was essential to the cause of action asserted. The right of the plaintiffs to recover was not dependent upon their proving immaterial or superfluous allegations."* (Italics ours.)

The following is quoted from *21 Ruling Case Law,* pages 452 and 453:

> "Surplusage consists in alleging facts other than those necessary to the sufficiency of the pleading. While surplusage may be rejected, and need not be proved, it is a well established rule that its presence in a pleading will not vitiate it."
>
> "If a plaintiff avers more than is necessary, and fails to sustain immaterial and redundant averments, but does prove all the material facts on which a right to relief is based, and no motion to correct the pleading has been made, it will be treated as sufficient, and the surplus allegations disregarded."

And the rule is stated as follows in *49 Corpus Juris,* at page 787:

> "As a general rule *no more need be proved, even though more be alleged, than enough to sustain the cause of action or defense relied upon.* In other words only those allegations necessary to a recovery need be supported by proof. Surplusage in a pleading need not be proved." (Italics ours.)

This court itself has held that an incomplete, uncertain, or inartistically drawn answer or specification of defense will not deprive an insurance company of a defense under the Prohibited Articles Warranty which has been fully established by the evidence adduced at the trial. We quote from pages 126 and 127 of the opinion in *Liverpool & London & Globe Insurance Company v. Gunther,* 116 U. S. 113, a case frequently referred to in our original brief:

> "It is true that the answer does not specifically set out as part of the defense that kerosene was kept on the premises to be used for lights, but that, in breach of the condition which permitted such use,

it was drawn after dark and with a lighted lamp near; but the right to keep it and use it in the manner specified in the condition is an exemption from the general prohibition, which forbids the mere keeping of it without written permission; so that, strictly speaking, *an averment that the article was kept and used on the premises, in violation of the condition, includes the use of it, otherwise than for lights, and the drawing of it otherwise than by daylight. Under the allegations of the answer, although not so definite and certain as might have been required, upon motion made in due time, it seems to us it was competent for the defendant to prove and rely upon any keeping and use of burning fluid prohibited by the conditions set out.*

Whatever obscurity there was in pleading the defense, considered apart from the facts subsequently disclosed in evidence, nevertheless, all the testimony necessary to its establishment was offered and admitted without objection. It was offered and admitted as tending to prove that there had been a breach of the conditions of the policy; and the whole matter of the defense was covered by the testimony, on examination and cross examination of the witnesses, both on the part of the defendant in chief and on that of the plaintiff in rebuttal. On the conclusion of the testimony on both sides the matter now insisted on was specially called to the attention of the court by a request on the part of the defendant's counsel to direct a verdict for the defendant on that ground alone, when, if it was a matter of surprise to the opposite party, opportunity for meeting it might still have been given; or if the pleadings were considered not to be sufficiently explicit, an amendment might have been required and made. *The request was re-*

fused, and it does not appear from the record to have been on the ground that the defense was not within the issues; but the refusal was absolute and unqualified. We refer to it, not for the purpose of intimating that the court was bound to grant the request, but because we think the matter ought to have then been either submitted to the jury or put in shape for such submission, if the rights of the adverse party required any change in the pleadings, or opportunity for the production of other evidence. *By the course actually taken the defendant was deprived of the benefit of a defense, legitimately arising upon the evidence actually in the case,* admitted without objection." (Italics ours.)

The purpose which petitioner had in mind, in averring that respondent had knowledge of the presence of the gasoline in the Bachmann Building, is clear. Petitioner intended to prove such knowledge if it could, in order to make its case as strong as possible; and under the West Virginia statutes hereinbefore referred to evidence tending to establish such fact would not have been admissible or competent unless based upon some averment in the specification of defense. Under petitioner's specification, as filed, knowledge could be proven, but need not be proven. Respondent could certainly not be prejudiced by the addition of an unnecessary averment.

If petitioner had pleaded that gasoline alone was being kept in the Bachmann Building, in violation of the Prohibited Articles Warranty, and then had sought to prove that some other prohibited article was also found in the building, respondent might well complain. But we are unable to see how respondent can be heard to complain that petitioner may have fallen short of

proving an unnecessary averment in its specification of defense.

Under the theory advanced by respondent, in the event of any doubt as to whether "control or knowledge" on the part of the insured must be proven to establish a defense under the Prohibited Articles Warranty, petitioner would have had to file two separte specifications of defense — one of which would have alleged knowledge by respondent of the presence of the prohibited articles and the other of which would have been in the same form precisely, except for the omission of the averment as to knowledge. Fortunately, such duplication of pleading is not necessary under our practice. The defendant alleges all relevant facts which he believes he may be able to prove. He then proves what he can; but he need not prove all of the facts alleged, unless all are essential to his defense. The greater includes the less.

(2) *Respondent's present contention that petitioner's defense under the Prohibited Articles Warranty was narrowed or restricted by the averments of its specifications of defense was not accepted by either the District Court or the Circuit Court of Appeals.*

It seems self-evident to us that this entire argument is now advanced by the respondent in the desperate hope that this court may be induced to lose sight of the one important issue raised by the charge of the District Court and the decision of the Circuit Court of Appeals affirming it. The District Court and the Circuit Court of Appeals both held that petitioner must prove that the respondent had "control or knowledge" of the gasoline found in the Bachmann Building, *because they were of the opinion that the addition of the "rider" or "permit" to respondent's policy eliminated gasoline*

from the Prohibited Articles Warranty. Respondent now asks this court to disregard entirely the ground upon which the District Court and the Circuit Court of Appeals rested their decisions, and to affirm the judgment on a *question of pleading* in which neither of the courts below could see any merit.

We do not recall that, at the trial in the District Court, the respondent ever advanced the argument that petitioner's defense under the Prohibited Articles Warranty had been restricted by the allegations of its specifications of defense. But if such contention was made, certainly the District Court rejected it. The District Court was of the opinion that petitioner had the burden of proving that respondent had "control or knowledge" of the gasoline being kept in the insured building; but this ruling was based upon the belief that gasoline had been eliminated from the Prohibited Articles Warranty by the "rider" or "permit" attached to respondent's policy, and not because of any idea that petitioner's defense had been narrowed or restricted by the pleadings. There can be no doubt upon this subject, because fortunately the record shows the reason underlying the District Court's ruling. We quote from Plaintiff's Instruction No. 8, which was given by the District Court at the request of counsel for respondent:

> "You are also charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff since *the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities*

of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline." (R. 146.) (Italics ours.)

So much for the action of the District Court on this subject. Upon the appeal to the Circuit Court of Appeals, this same argument based upon the alleged restrictive effect of petitioner's pleading was advanced and discussed by respondent in her brief. Petitioner then filed a reply brief dealing with the same proposition: *The Circuit Court of Appeals wholly disregarded and rejected respondent's argument on the question of pleading and based its decision upon the same ground as had the District Court—namely, that petitioner had the burden of proving "control or knowledge" of the gasoline on the part of the respondent on the theory that gasoline had been entirely eliminated from the Prohibited Articles Warranty by the "rider" or "permit".* That the Circuit Court of Appeals found no merit in respondent's attack upon petitioner's specification of defense is apparent from the opinion, in which no mention was made of it. We quote the pertinent portion of the opinion of the Circuit Court of Appeals:

> "At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil, and it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being stored in the building. *It was contended on the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles War-*

> *ranty,* and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the Increased Hazard Class. *The trial court took this view of the case, and we think properly so.* The agent of the Insurance Company knew that the rider permitted the use of gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, the Insurance Company must under the terms of the policy, as above discussed, bring such fact "within the knowledge and control" of the insured or her agent." (R. 179, 180.) (Italics ours.)

We are astounded to find in respondent's brief (see pages 26 and 27 of brief) the assertion that petitioner is attempting to prevail in this court on a different theory from that urged in the District Court and the Circuit Court of Appeals. The statement that the petitioner is now seeking to shift its ground of defense is rather amusing, since the fact is that the shoe is on the other foot. Respondent advances here the argument that the judgment complained of should be affirmed upon a ground entirely different from that on which both the District Court and the Circuit Court of Appeals based their decisions. Nor is this all. *The record shows that the respondent herself did not rely in the District Court upon this question of pleading, but upon the "rider" attached to her policy.* The District Court embodied in its charge *verbatim* a number of written instructions prepared by respondent's counsel (R. 140), including Plaintiff's Instruction No. 8, an extract from which has been hereinbefore quoted. Hence, the following language from Plaintiff's Instruction No.

8 represents a written memorial of what respondent's contention was in the trial court:

> "The defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on *is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises, since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline.*" (R. 146.) (Italics ours.)

In view of this change of face, it hardly lies in the mouth of the respondent to say anything about a shifting of positions or a changing of theories. It seems apparent that the respondent has lost confidence in the theory which she successfully urged upon both the District Court and the Circuit Court of Appeals (that is, that gasoline was eliminated from the Prohibited Articles Warranty by the "rider"), and now wants this court to affirm her judgment because of a supposed weakness in petitioner's pleading which neither of the courts below found to exist.

II.

THE RESPONDENT'S OWN INTERPRETATION OF THE MODIFICATION MADE IN THE PROHIBITED ARTICLES WARRANTY BY THE "RIDER" CONDEMNS THE DISTRICT COURT'S CHARGE AS ERRONEOUS.

In petitioner's original brief, we asserted (see brief, pages 38-39) that the only point of difference between the petitioner and the respondent, in their interpretation of the *language* of the so-called gasoline "permit", was whether the adjective *"Mercantile"* should be included. Petitioner's contention is that the "permit" allowed the use of gasoline for the following purposes only:

> "For bottling Automobile Oils, Offices, and other *Mercantile* purposes not more hazardous." (See petitioner's brief, pages 34-39).

The respondent's contention, as we then understood it, and as it is stated in petitioner's brief, was that the "permit" allowed gasoline on the premises for the following uses:

> "For bottling Automobile Oils, Offices, and other purposes not more hazardous." (See petitioner's brief, 34-39.)

It is interesting to note that in her brief the respondent has confirmed our statement of her position regarding the *language* of the "permit". We quote from page 32 of respondent's brief:

> "It can be readily seen that while the printed policy prohibited the keeping, using, and allowing of gasoline, *the occupancy clause in the rider was intended to and did permit it for any purpose not more hazardous than bottling automobile oils.*" (Italics ours.)

We submit that on her own statement of the proposition, as just quoted, respondent necessarily admits the error in the District Court's charge, for she concedes that the "permit" did not cover a "more hazardous" use of gasoline. Whether the storage and use of gasoline by the tenant Varisca to operate his moonshine stills was a "more hazardous" purpose, therefore, became, upon the evidence adduced at the trial, either a question of *law* or a question of *fact*. For the reasons pointed out more at length in petitioner's original brief (see brief, pages 43-46), and in the light of the authorities there cited, we submit that the tenant Varisca's use of gasoline in connection with the operation of his moonshine stills clearly fell within the classi-

fication of a "more hazardous" purpose, *as a matter of law.*

Furthermore, even if it could be said that the use made of the gasoline by Varisca was "not more hazardous" as a matter of law, then the question as to the relative hazards became one of *fact* for the jury. *This question was not submitted to the jury by the District Court,* as we pointed out in petitioner's original brief (see brief, pages 46-47).

However, respondent's brief contains numerous assertions that the jury passed upon this question in her favor. We quote the following extracts from pages 33 and 34 of respondent's brief:

> "Whether the keeping and using of gasoline for the purpose of operating stills, is more hazardous than the keeping and using of gasoline for the purpose of bottling automobile oils, is a question of fact. This fact was passed upon by the jury."
>
> "The question as to whether the hazard was increased during the last occupancy having been submitted to the jury and the jury having found for the respondent clearly the purpose for which the building was being used at the time of the fire was not more hazardous.
>
> The jury having found that the use being made of the premises was not more hazardous than was permitted by the policy, the petitioner cannot now claim that the purpose for which the building was being used at the time of the fire was more hazardous."

These assertions are wholly incorrect and unwarranted, as the record clearly shows. At respondent's own instance, the District Court refused to submit to the jury any question as to increase of hazard, *unless*

with it was combined the question of whether the respondent had "control or knowledge" thereof. In other words, the District Court instructed the jury throughout its charge that a verdict should not be returned in favor of the petitioner unless the jury believed both that (1) the hazard had been increased, and (2) the respondent had "control or knowledge" thereof. This is well illustrated by the District Court's summing up of the case adopted from Plaintiff's Instruction No. 10, as follows:

> "To sum up and state briefly and concisely the law applicable to the main issue in this case, you are charged by the Court that *the defendant Insurance Company cannot escape liability in this action unless it has proven to your satisfaction by a preponderance of the evidence that either the said Sophia C. Bachmann or her agent, the said Charles F. Bachmann, had knowledge of the matters and things alleged by the defendant to have been done and performed by Bill Varisca* and/or his associates and if, on the contrary, you believe from the evidence that neither the said Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, had any control or knowledge of such matters and things, then your finding must be against the defendant Insurance Company and in favor of the plaintiff, Sophia C. Bachman." (R. 147). (Italics ours).

The respondent contends (see her brief, page 33) that under Defendant's Instruction No. 5, embodied by the District Court in its charge, "this fact (whether Varisca's use of gasoline was more hazardous) was passed upon by the jury". However, the record shows that Defendant's Instruction No. 5 (see R. 150) did not mention gasoline at all, and was tendered by the peti-

tioner solely in connection with its defense under the Increase of Hazard Warranty; consequently, the instruction required the jury to find both (1) an increase of hazard, and (2) control or knowledge of such increased hazard by the respondent, before a verdict could be returned for the petitioner. Hence, the verdict returned for the respondent did not constitute, in any sense, a finding that the operation of moonshine stills by gasoline was not a "more hazardous" purpose than its use as an ingredient in the bottling of automobile oils, or even that the fire hazard generally had not been increased. The gravamen of the respondent's argument in the District Court, as shown by the instructions which she tendered and which the District Court embodied in its charge, was that the petitioner had not sufficiently proven "control or knowledge" by respondent of the conditions prevailing in the insured building at and before the fire, and doubtless the acceptance of this argument by the jury is the explanation of its verdict.

Upon the examination of the record, and the charge of the District Court, the fact is inescapable that the District Court did not submit to the jury the simple question of whether gasoline was being used by the tenant Varisca for a "more hazardous" purpose. In every part of its charge, including the summing up at the end (R. 147), the District Court impressed upon the jury repeatedly that the question of whether the respondent had "control or knowledge" of the articles found in the Bachmann Building was the one important issue of fact in the case. Hence, we submit that the charge was erroneous, even under respondent's contention that it was a question of fact whether the use being made of the gasoline at the time of the fire was "more hazardous", and thus beyond the protection of

the "permit"; and *a fortiori* it was erroneous under petitioner's contention that the operation of moonshine stills by gasoline, under the conditions shown by the evidence, was more hazardous than the bottling of automobile oils, *as a matter of law.*

III.

THE CASE OF WHITLATCH v. MUTUAL FIRE INSURANCE COMPANY.

In our original brief, we cited the case of *Whitlatch v. Mutual Fire Insurance Company,* decided by the Supreme Court of Appeals of West Virginia on October 13, 1931; and the opinion of the West Virginia court was copied in full in Appendix A. At the time the original brief was printed and filed, the *Whitlatch Case* had not yet appeared in the reports. Since that time, however, the case has appeared in the Southeastern Reporter, and will be found in *161 S. E. 3.*

* * * * * * *

For the foregoing reasons, and those set forth more fully in petitioner's original brief, it is respectfully submitted that the judgment and decision of the Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the United States District Court for the Northern District of West Virginia, should be reversed.

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IN THE

Supreme Court of the United States

OF AMERICA

OCTOBER TERM, 1931

No. 311

ST. PAUL FIRE & MARINE INSURANCE COMPANY, A CORPORATION, PETITIONER,

V.

SOPHIA C. BACHMANN, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

CARL G. BACHMANN,
CHARLES J. SCHUCK,
J. BERNARD HANDLAN,
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INDEX TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

	Page
The Opinion of the Circuit Court of Appeals	3
Explanation	4
Statement of Facts	4
Argument	5
The cases of London and Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool and London and Globe Insurance Co. 134 U. S. 110, are not in conflict with the decision of the Circuit Court of Appeals in the present case	6
The cases of Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, and U. S. Fidelity and Guaranty Co. v. Guenther, 281 U. S. 34, when applied to the decision of the Circuit Court of Appeals, in the present case, are not in point	10
The case of Miller v. Union Assurance Society, 39 Fed. (2) 25, is not in conflict with the decision of the Circuit Court of Appeals in the present case	13
This case does not present a question of importance beyond the present case	16
Parts of the Insurance Contract Involved	18
Increase of Hazard Warranty	20
Prohibited Articles Warranty	20
The "Substituted Form" or Rider	20
Hand Book of Rules of the West Virginia Fire Underwriters Association	22
Petitioner's Specifications of Defense No. 2	26
Increase of Risk	32
Conclusion	35

TABLE OF CASES CITED

Bachmann v. St. Paul Fire & Marine Insurance Co., 49 Fed. (2) 158. (The present case)	3
Behler v. German Mutual Fire Insurance Co., 68 Ind. 347	15

	Page
Boling v. Insurance Company 86 W. Va. 165	28
Booher v. Insurance Company 91 W. Va. 468	28
Colker v. Connecticut Fire Insurance Co., 290 S. W. (Ky.) 1073	31
Fayle v. Camden Fire Insurance Association, 278 Pac. (Mont.) 509	31
First National Bank v. Hartford Fire Insurance Co., 95 U. S. 673, 678, 679	12
Gunther v. Liverpool and London and Globe Insurance Co., 134 U. S. 110	6
Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, 462	10
Liverpool and London and Globe Insurance v. Gunther, 116 U. S. 113	6
Martin v. Capital Insurance Co., 85 Ia. 643, 52 N. W. 534	15
Miller v. Union Assurance Society, 39 Fed. (2) 25	13
Missouri State Life Insurance Co. v. Guess, 17 Fed. (2) 450	28
Mutual Life Insurance Company of New York v. Hurni Packing Company, 263 U. S. 167	11
Nebraska Insurance Co. v. Christeinsen, 29 Neb. 572, 45 N. W. 924	15
Ragley v. Northwestern Insurance Co., 276 Pac. (Wash.) 537	32
Railway Mail Association v. Moore, 15 Fed. (2) 547	28
Royal Exchange Assurance Co. v. Thrower, 240 Fed. 811, 814, 815	30
Royal Exchange Assurance Co. v. Thrower, 246 Fed. 768	30
Shinn v. Insurance Co., 104 W. Va. 353	28
Thompson v. Phenix Insurance Co., 136 U. S. 287, 297	12
U. S. Fidelity and Guaranty Co. v. Guenther, 281 U. S. 34	10

IN THE

Supreme Court of the United States

OF AMERICA

OCTOBER TERM, 1931

No. 311

ST. PAUL FIRE & MARINE INSURANCE COMPANY, A CORPORATION, PETITIONER,

V.

SOPHIA C. BACHMANN, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I

OPINION OF THE CIRCUIT COURT OF APPEALS

The opinion of the Circuit Court of Appeals for the Fourth Circuit deciding this case on its merits will be found in 49 Fed. (2) 158, also at pages 185 to 189 of the Record.

II

EXPLANATION

For convenience and brevity, St. Paul Fire and Marine Insurance Company, a corporation, petitioner, is referred to as "petitioner" and Sophia C. Bachmann, respondent, as "respondent".

III

STATEMENT OF FACTS

On the 14th day of February, 1924, petitioner issued to respondent its policy of fire insurance for Four Thousand Dollars on a four-story brick building, occupied as a produce store, situate at 1312 Main Street, Wheeling, West Virginia.

In the Spring of 1925 at the request of the respondent, through her agent, the building, which was then being used by a tenant for the manufacturing and bottling of automobile oils, was inspected by petitioner's agent and there was attached to respondent's policy as a "Substituted Form", a rider or endorsement permitting the keeping, using and allowing of gasoline on the premises (R. p. 3-4).

On the 27th day of December, 1925, while the building was being occupied by another tenant, the insured building was totally destroyed by fire. It was claimed by petitioner that three stills and quantities of gasoline were found on the premises after the fire and the petitioner denied liability under two provisions of the policy. The evidence adduced on behalf of respondent tended to show there was NO GASOLINE on the premises at the time of the fire in question.

The building was managed by the husband of the respondent, who, as agent for the respondent, had for many years attended to all the details of supervising, maintaining and leasing the building.

It is conceded that the respondent knew nothing about the building or the tenant.

Evidence was offered on behalf of the petitioner, tending to show that Bachmann, the agent, knew or should have known that the building was used by the tenant for operating stills. This was vigorously denied by Bachmann, and in submitting the case to the jury, the judge instructed in accordance with the pleadings and in the language of the policy. The jury returned a verdict for the respondent.

IV

ARGUMENT

Petitioner urges and relies upon each of the following four grounds for the allowance of a writ of certiorari:

1. The decision of the Circuit Court of Appeals, in the present case, is in conflict with the decisions of this Court in Liverpool and London and Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool and London and Globe Insurance Co. 134 U. S. 110.
2. The decision of the Circuit Court of Appeals, in the present case, in seeking to apply the rule of strict construction is in conflict with the decision of this Court in Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, and U. S. Fidelity and Guaranty Co. v. Guenther, 281 U. S. 34.

3. The decision of the Circuit Court of Appeals, in the present case, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Miller v. Union Assurance Society, 39 Fed. (2) 25.
4. The question presented here is of importance beyond the present case.

We respectfully submit that an examination of the cases relied upon, namely, the two Gunther cases, supra, the Coos County case, supra, the Guenther case, supra, and the Miller case, supra, and an inspection of the printed policy and the rider thereto attached, in the present case, will not justify the allowance of a writ of certiorari in this case.

1.

THE CASES OF LIVERPOOL AND LONDON AND GLOBE INSURANCE CO. v. GUNTHER, 116 U. S. 113, AND GUNTHER v. LIVERPOOL AND LONDON AND GLOBE INSURANCE CO., 134 U. S. 110.

Counsel for petitioner contend that the decision of this court in the Gunther Case, 116 U. S. 113, is in conflict with the decision of the Circuit Court of Appeals in the present case. This argument illustrates once again the futility of citing one case as a precedent for another, when the two decisions must turn upon the proper construction and interpretation of two wholly isolated private contracts, each presenting its own peculiar, independent and dissimilar provisions. The determining points upon which is founded the decision in the Gunther Case are not involved in the present case; the determining points which must dic-

tate the decision in the present case are altogether different, arising, as they do, from the peculiar language and provisions of the particular contract here under consideration. A careful examination of the Gunther Case and of the present case will disclose beyond all question that the respective contractual terms which are decisive of the result in each case are so entirely and utterly variant that a decision in one case could in no light be regarded as governing or controlling the other.

The policies in the Gunther Case prohibited the keeping or using of gasoline upon the insured premises, with this one specific exception, the

> "Privilege to use gasoline gas, gasometer blower and generator being underground about 60 feet from main building in vault. No heat employed in process."

There was no provision in the policies with respect to an increase of the fire hazard. There was no provision in the policies with respect to the necessity for showing knowledge of the insured of violations of the policy. At the time of the fire, in the Gunther case, gasoline stored in the oil room of the insured hotel was not being used in connection with the gasometer specified in the permit, but was being used either in torches for lighting a pavilion or for lighting picnic grounds some distance away. The use of gasoline at the time of the fire was thus clearly and obviously unwarranted by and in violation of the specific exception that it might be used in connection with the designated gasometer. No question as to INCREASE OF THE FIRE HAZARD was involved, since the policies carried no such clause. No question as to the KNOWLEDGE OF THE INSURED was material, since he had engaged that the